Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

80-1224

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSAMERICAN PRESS, INC.
and MIKE PARKHURST,

Petitioners

v.

MURRAY W. (DUSTY) MILLER,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

Charles L. Babcock
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
4300 First National Bank Building
Dallas, Texas 75202
(214) 655-2911

Counsel of Record for Petitioners

Of Counsel:

James M. Schendle
PULLMAN & SCHENDLE
2001 Bryan Tower, Suite 2914
Dallas, Texas 75201

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in refusing to apply to petitioners the qualified First Amendment privilege against judicially compelled disclosure of the identities of confidential news sources during pretrial discovery in a public figure, media libel case.

2. Whether the Court of Appeals erred in refusing to decide which state's law applies in a multi-state defamation action brought in Texas by a Virginia plaintiff against California media defendants.

3. Whether the Court of Appeals erred in failing to apply California Constitutional, statutory and/or common law which shields reporters from revealing the identity of their confidential news sources during pretrial discovery in a libel case and, in the alternative, whether the Court erred in failing to apply Texas Constitutional and/or common law to the same effect.

LIST OF PARTIES

1. Transamerican Press, Inc., a California corporation with its principal place of business in California.*

2. Michael Parkhurst.

3. Murray W. (Dusty) Miller.

4. Although not a party, the reporter, Jim Drinkhall, has an interest in this litigation.

5. Although not a party, the International Brotherhood of Teamsters may have an interest in this litigation.

---

*In compliance with Rule 28.1 of the Court's Rules of Practice it is hereby certified that Transamerican Press, Inc. is neither the parent nor the subsidiary of any other corporation. Transamerican Press of Texas, Inc. is not a party to this proceeding although it was erroneously listed as an appellant in the court below. Transamerican Press of Texas, Inc. was granted a summary judgment in its favor prior to the interlocutory appeal involved herein. To petitioners' knowledge Transamerican Press of Texas, Inc. is neither the parent nor the subsidiary of any other corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below Conflicts With the Decisions of Other Courts of Appeal as to the Proper Application of the Qualified First Amendment Privilege Prohibiting Judicially Compelled Disclosure of Confidential News Sources. The Proper Scope of the Privilege In a Libel Case Has Never Been Addressed by This Court and Is a Matter of Paramount Importance to the Press and the Public	6
2. The Decision Below Raises Significant and Recurring Problems Concerning Application of the First Amendment Privilege	12
3. The Decision Below Raises Significant and Recurring Problems Concerning Proper Application of State Law Creating a Privilege Against Disclosure of Confidential News Sources In a Multi-State, Public Figure, Media Defamation Action Where Diversity Jurisdiction Is Invoked	14
CONCLUSION	20
APPENDIX (Opinion and Judgment of Court of Appeals; Opinion of District Judge)	I-1,II-1

TABLE OF AUTHORITIES

Page

CASES:

Amato v. Fellner, 4 Med.L.Rptr. 1552 (Wis.Cir.Ct., 1978).... 13

Ammerman v. Hubbard Broadcasting, Inc., 572 P.2d 1258 (N.M.Ct.App. 1977), *cert. denied*, 436 U.S. 906 (1978)..... 13

Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) 7

Bilney v. Evening Star, 5 Med.L.Rptr. 1931 (Md.Ct.App., 1979) 13

Branzburg v. Hayes, 408 U.S. 665 (1972) 7, 8, 11, 13

Brewer v. Memphis Pub. Co., 626 F.2d 1238, 1241 (5th Cir. 1980) 17

Bruno & Stillman, Inc. v. Globe Newspaper Company, ... F.2d ..... (1st Cir. 1980) 8

Caldero v. Tribune Pub. Co., 562 P.2d 791 (Id.Sup.Ct., 1977), *cert. denied*, 434 U.S. 930 (1977) 13

Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dis'd*, 417 U.S. 938 (1974) 8

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973) 10, 11

Dow Jones & Co. v. Superior Court of Mass., 303 N.E.2d 847 (Mass. Sup. J. Ct. 1973) 13

Downing v. Monitor Publishing Co., 415 A.2d 683 (N.H. Sup. Ct., 1980) 13

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)..... 16

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)..... 11

Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) 8, 9

Page

Goldfeld v. Post Publishing, 4 Med.L.Rptr. 1167 (Conn. Super. Ct., 1978) 13

Greenberg v. CBS, Inc., 419 N.Y.S.2d 988 (1979) 13

Gutierrez v. Collins, 583 S.W.2d 312 (Tex.Sup.Ct. 1979) 17

Hart v. Playboy Enterprises, 4 Med.L.Rptr. 1616 (D.Kan., 1978) 13

Hennessy v. Wright, (No. 2), 24 Q.B.D. 445n (C.A.) (1888)... 19

In re Dack, 5 Med.L.Rptr. 1886 (N.Y.Sup.Ct., 1979) 13

In re Roche, 101 S.Ct.4 (1980) (Brennan, J., granting stay) 7, 12

Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487, 496 (1941) 16

Leffel v. Municipal Court of Fresno County, 54 Cal. App. 3d 569, 126 Cal Rptr. 773 (Cal. App. — 5th Dist., 1976) 15

Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) 11

Marks v. Morris, 4 HEN. & M. (14 Va.) 463 (1809) 19

Mazella v. Philadelphia Newspapers, 479 F.Supp. 523 (E.D. N.Y., 1979) 13

Mize v. McGraw-Hill, 5 Med.L.Rptr. 1156, adhered to on rehearing, 5 Med.L.Rptr. 2614, (S.D. Tex., 1979) 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 17

Plymouth Mutual Cooperative and Industrial Society v. Trader's Publishing Association, 1 K.B. 403 (C.A.) (1906)... 19

Rancho La Costa v. Penthouse, 6 Med.L.Rptr. 1249 (Cal. Super.Ct., 1980) 13

Riley v. Chester, 612 F.2d 708 (3d Cir. 1979) 9

Rosato v. Superior Court of Fresno County, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (Cal. App. — 5th Dist., 1975), *cert. denied.*, 427 U.S. 912 (1976) 15, 16

Page

Sierra Life Ins. v. Magic Valley Newspapers, 6 Med.L.Rptr. 1769 (Id. Sup. Ct., 1980) 13

Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) 7, 11

Smith v. Rhea, 72 Cal. App. 3d 361, 140 Cal. Rptr. 116, (Cal. App. — 4th Dist., 1977) 14

Steaks Unlimited v. Deaner, 623 F.2d 264 (3d Cir. 1980) ... 9, 17

United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977) (per curiam) (en banc) 10

Winegard v. Oxberger, 258 N.W.2d 847 (Ia. Sup. Ct., 1977), *cert. denied*, 436 U.S. 905 (1978) 13

CONSTITUTIONAL PROVISIONS AND STATUTES:

Cal. Const. art. 1, §2 ..... 2, 3

California Civil Code Section 22.2 18

California Evidence Code §1070 2

Tex. Const. art. 1, §8 ..... 3, 19

U.S. Const. amend I 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1292(b) 5

28 U.S.C. §1332 4

BOOKS AND ARTICLES:

Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. J. 521 (1977) 6

Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 253-54 (1971) 6

Page

Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L. Rev. 1111, 1115-21 (1960) 19

Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969) 6

Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971 (1953) 14

Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 Hastings L.J. 1515 (1979) 17

R. Sack, *Libel, Slander and Related Problems*, 528 (1980) 18

C. Wright and K. Graham, *23 Federal Practice and Procedure*, §5426 at 792 (1980) 11

MISCELLANEOUS:

58 Cal. Jr. 3d Statutes Section 161 at 562 (1980) 14, 15

Hearings on S. 36 Before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 1973, 93 Cong., First Sess. pp. 41, 114 6

A California Privilege Not Covered by the Uniform Rules — Newsmen's Privilege, 6 Cal. Law Rev. Comm., 481, 506 (1964) quoted in Comment, Newsman's Immunity Statute, 8 San Diego L. Rev. 110, 113 (1971) 18

Restatement Second, Conflicts of Laws 17

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSAMERICAN PRESS, INC.
and MIKE PARKHURST,
Petitioners

v.

MURRAY W. (DUSTY) MILLER,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

The petitioners, Transamerican Press, Inc., and Mike Parkhurst*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 15, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 621 F.2d 721 appears in the Appendix hereto, as does the unreported opinion of the District Court for the Northern District of Texas.

*Transamerican Press of Texas, Inc. listed in the Court of Appeals decision as an appellant had, prior to this interlocutory appeal, been granted a summary judgment by the Trial Court.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 15, 1980. A timely petition for rehearing and rehearing *en banc* was denied on October 23, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Cal. Const. art 1, §2*:

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a

*Section (b) was formerly Section 1070 of California Evidence Code.

newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in the subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Tex. Const. art 1, §8:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

STATEMENT OF THE CASE

A Virginia resident, Murray W. (Dusty) Miller (hereinafter referred to as "respondent"), filed this libel action in the United States District Court for the Northern District of Texas against two California residents, Transamerican Press, Inc. which publishes the magazine "Overdrive" and Mike Parkhurst, owner of Transamerican, on January 17, 1973.* Diversity of citizenship is the sole jurisdictional basis for this suit. 28 U.S.C. §1332. Respondent complains of an allegedly libelous article (hereinafter "the article") which dealt with his activities as a trustee for the International Brotherhood of Teamsters' Central States Pension Fund. The article appeared in "Overdrive Magazine" which, contrary to the statement in the Court of Appeals opinion, is an existing periodical, continuously published since 1961.

Most of the discovery and judicial proceedings to date have involved an effort by respondent to learn from petitioners the identity of certain confidential news sources relied upon by the reporter, Jim Drinkhall, in preparing the article. Mr. Drinkhall is no longer employed by Transamerican Press, Inc., and was not so employed at the time of the Trial Court's order requiring disclosure of confidential news sources. He is not a party to this litigation and has been a resident of California continuously throughout the course of these proceedings. Mr. Drinkhall currently works in San Francisco for the *Wall Street Journal* as a reporter.

Respondent's efforts to learn the identity of the confidential news sources began three days after petitioners filed their answer in District Court. On that date respondent sought disclosure of

---

*A third defendant to the lawsuit — Transamerican Press of Texas, Inc., a Texas resident — was granted a Summary Judgment in its favor prior to this interlocutory appeal.

the sources through interrogatories. Following petitioners' refusal to reveal their sources, a motion to compel answers was filed and denied by the Court. Respondent then sought to learn the identity of the sources at the depositions of Drinkhall and petitioner Parkhurst. When Drinkhall and Parkhurst refused to disclose this information, respondent again moved to compel answers and was again overruled by the Court. A continuation of the Drinkhall deposition was sought by respondent and granted by the Court which, however, in an order entered on July 26, 1974, continued to decline to order disclosure of confidential sources.

Between July 26, 1974 and the time the District Court finally ordered petitioners to reveal their confidential sources on October 18, 1977 the respondent completed only one piece of non-party discovery, the deposition on written questions of a friendly witness, Morris Shenker. This discovery related to whether the article in question was false and not whether petitioners had acted with "actual malice" in publishing it. It dealt with the source question only to the extent that an unlikely candidate denied he was the source.

The District Court certified an interlocutory appeal from its ruling compelling petitioners to reveal the identity of the sources. This interlocutory appeal was permitted by the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. §1292(b).

The Fifth Circuit rejected the petitioners' claim that, under Texas choice of law rules, California law must apply to this transaction and that the California law which prohibits judicially compelled disclosure of the identity of confidential news sources required reversal of the District Court. The Court of Appeals held that the First Amendment of the United States Constitution provided a qualified privilege against judicially compelled disclosure of confidential news sources, but that respondent had met his burden of overcoming the privilege including the exhaustion of "alternative sources."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER APPLICATION OF THE QUALIFIED FIRST AMENDMENT PRIVILEGE PROHIBITING JUDICIALLY COMPELLED DISCLOSURE OF CONFIDENTIAL NEWS SOURCES. THE PROPER SCOPE OF THE PRIVILEGE IN A LIBEL CASE HAS NEVER BEEN ADDRESSED BY THIS COURT AND IS A MATTER OF PARAMOUNT IMPORTANCE TO THE PRESS AND THE PUBLIC.

This Court has never decided whether the First Amendment to the United States Constitution conveys a privilege whereby the press may refuse to reveal the identities of confidential news sources in the context of pre-trial discovery in a public figure media libel case. This issue is of enormous importance to journalists and the public. *See generally,* Hearings on S. 36 Before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 1973, 93 Cong., First Sess. pp. 41, 114. Investigative reporting depends heavily on "not for attribution," "off the record" background sessions, leads, and continuing relationships with sources. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L.Rev. 229, 253-54 (1971); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). Without protection against judicially compelled disclosure of their identities these sources will dry up and an important function of the press in checking abuse of official power (the "Checking Value") will be undermined. Blasi, *The Checking Value in First Amendment Theory,* 1977 Am. Bar Found. J. 521 (1977).

In 1972 this Court reviewed the claims of several journalists that they should not be required to reveal the identity of

confidential news sources to a grand jury. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Their argument was based upon an asserted privilege under the First Amendment to the United States Constitution. Four members of this Court found that no such First Amendment privilege existed. Four dissenting justices believed there was such a privilege although they disagreed over its scope. Mr. Justice Powell concurred in the judgment of the Court declining to exempt the reporters from revealing the identity of their sources to a grand jury under the circumstances presented for review. However, Mr. Justice Powell's concurring opinion has been cited by the lower courts as recognizing some form of reporter's First Amendment privilege. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433,437 (10th Cir. 1977). Mr. Justice Brennan has recently indicated that this Court has not foreclosed news reporters from resisting a subpoena directed at sources on First Amendment grounds. *In re Roche*, 101 S.Ct. 4 (1980) (Brennan, J., granting stay). *Roche* and *Branzburg*, do not consider the source question in the context of a public figure libel case as is here presented for review. As the Second Circuit noted in *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) the competing interests in a libel case are quite different from the concerns of the parties in the grand jury context:

> Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure. 470 F.2d at 784-85.

Since *Branzburg* there have been a number of lower court decisions dealing with the First Amendment privilege against disclosure of confidential news sources in libel cases. The Federal circuits which have decided this issue have generally agreed that the press enjoys some First Amendment privilege. However, the Circuits have reached conflicting results as to the scope of the privilege. In the instant case, the Fifth Circuit ruled that in order to overcome the First Amendment privilege against disclosure, a plaintiff must establish: (1) that the information sought is relevant; (2) that the information cannot be obtained by alternative means; and (3) there is a compelling interest in the information. The Fifth Circuit went on to require that there must be substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable sources are available; and that knowledge of the identity of the informant is necessary for proper preparation and presentation of the case. A review of the Circuits reveals disagreement over the scope of the privilege in the libel context. The pertinent cases are as follows:

A. D.C. Circuit

The District of Columbia Circuit has rejected a reporter's claim of absolute privilege in a libel case. See *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dis'd*, 417 U.S. 938 (1974). It adopted a balancing test relying on the Second Circuit opinion in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). Thus, the District of Columbia requires: (1) The information sought must go to the heart of plaintiff's libel action, and; (2) plaintiff's claim must be nonfrivolous. 492 F.2d at 636-37.

B. First Circuit

In *Bruno & Stillman, Inc. v. Globe Newspaper Company*, ... F.2d .... (1st Cir. 1980) the First Circuit Court of Appeals held

that there was a First Amendment privilege against disclosure of confidential news sources in a public figure libel case. The Court articulated the test for overcoming the privilege as (1) relevance in an important sense to plaintiff's claim; (2) availability of the information from other sources (3) and nonfrivolousness of the cause of action. The First Circuit stated, however, that: "The task is one that demands sensitivity, invites flexibility, and defies formula. While obviously the discretion of the trial judge has wide scope, it is a discretion informed by awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have."

C. Second Circuit

The controlling authority in the Second Circuit is *Garland v. Torre, supra.* There the Court implied there might be some First Amendment protection where there was an effort to force a "wholesale disclosure of a newspaper's confidential sources of news" or where "the identity of the news source is of doubtful relevance or materiality." 259 F.2d at 549-50. But the Court ruled that the privilege must yield where the identity of the source "went to the heart of the plaintiff's claim." *Id.*

D. Third Circuit

The Third Circuit in *Steaks Unlimited v. Deaner,* 623 F.2d 264 (3d Cir. 1980) applied the Pennsylvania shield law without reaching the scope of the Constitutional privilege in the context of a libel case. No other Third Circuit case has considered the question although a qualified federal common law privilege has been extended in a civil case. *See, Riley v. Chester,* 612 F.2d 708 (3d Cir. 1979) where the Court required (1) high degree of relevance and (2) exhaustion of alternative sources to overcome the privilege. The Court expressly distinguished *Riley* from public figure libel litigation.

E. Fourth Circuit

The Fourth Circuit has not dealt with the question of confidential source during pretrial discovery in a libel case. However, it has adopted a qualified privilege in a criminal action without discussion of the parameters of the privilege. *See, United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (per curiam) (en banc).

F. Fifth Circuit

The controlling Fifth Circuit case is the subject of the instant petition.

G. Sixth and Seventh Circuits

The Sixth and Seventh Circuits have not yet considered the scope of a reporter's privilege in a libel case.

H. Eighth Circuit

The leading Eighth Circuit case is *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) where a plaintiff sought to reverse summary judgment for defendant on the ground that plaintiff had been denied disclosure of the identity of defendant's sources. The Eighth Circuit declined to reverse because not a "scintilla" of evidence on actual malice had been produced for the summary judgment proceeding. The Court held that a libel plaintiff must uncover substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant. *Id.* at 994.

I. Ninth Circuit

The Ninth Circuit cases involving a reporter's privilege are all in the criminal or grand jury context. The Court rejected a

qualified First Amendment privilege in the grand jury context. *See, Lewis v. United States,* 517 F.2d 236 (9th Cir. 1975). However, some recognition for a qualified privilege has surfaced in the Circuit. *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976). The Ninth Circuit has not dealt with the scope of the privilege in a libel case.

J. Tenth Circuit

In *Silkwood v. Kerr-McGee, supra,* the Tenth Circuit applied a four-part test for the qualified privilege said to be derived from the *Garland* decision: (1) whether alternative sources have been exhausted; (2) whether the information goes to the heart of the matter; (3) whether the information is relevant; and (4) the type of controversy.

The Circuits are generally in agreement as to the existence of a qualified First Amendment privilege but differ on its scope and applicability. The interests at stake in a civil libel case differ considerably from those at issue in the grand jury context which this court was reviewing in *Branzburg v. Hayes. See, Cervantes v. Time, Inc., supra* at 992-93 n.9. The need for protection of the source is greater in a libel case than in the grand jury setting. "Given the ease with which a cause of action for defamation can be stated under modern pleading rules, a person wishing to learn the identity of the source in order to take revenge might file suit for the sole purpose of discovering his name from the reporter." C. Wright and K. Graham, 23 *Federal Practice and Procedure,* §5426 at 792 (1980).

While most of the Federal Circuits require exhaustion of "alternative sources" there is no clear understanding of what that means. In staying a ruling of the Massachusetts Supreme Judicial Court, Mr. Justice Brennan stated:

> [T]here is support for the proposition that the First Amendment interposes a threshold barrier to the subpoena of confidential information and work product from a newsgatherer. . . . Assuming that there is at least a limited First Amendment right to resist intrusion into the newsgathers' confidences, this case presents an apt occasion for its invocation. As determined by Justice Kaplan below, respondent judge could have obtained the information sought from the applicant by other adequate — albeit somewhat roundabout — methods. *In re Roche*, 101 S.Ct. 4, 6 (1980) (Brennan, J., stay order).

Mr. Justice Brennan implies that *all* alternative sources must be exhausted. If that is the test it was not required here. The District Court made *no* finding that alternative sources had been exhausted contrary to the statement in the Court of Appeals opinion. *See* App. I-9, II-1-2. In this case, between July 26, 1974 when the District Court found alternative sources had not been exhausted and October 18, 1977 when the court ordered disclosure of the sources the respondent did nothing to exhaust other than to depose a friendly witness. Petitioners repeatedly asserted in the Courts below that respondent should have exhausted the following sources: (a) Justice Department files; (b) Internal Revenue Service files; and (c) interviews or depositions of various individuals. If these alternatives had been explored, disclosure of the confidential sources would have been unnecessary. The Court below erred in determining that alternative sources were exhausted even if it correctly stated the proper First Amendment test.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING APPLICATION OF THE FIRST AMENDMENT PRIVILEGE.

As indicated in the previous section, most of the United States Circuit Courts of Appeal have considered whether the First

Amendment confers a privilege upon journalists who refuse to reveal confidential sources in a libel case. Additionally, in the nine years since *Branzburg* there has been an explosion of cases in all state courts and in federal district courts regarding the scope of this privilege. The problem arises in many, if not most, libel cases — particularly where the plaintiff is a public figure, as here, and where the press is defendant. The following is a representative list of cases in the United States District Courts and in state courts dealing with disclosure of confidential news sources in the context of a libel case: *Hart v. Playboy Enterprises*, 4 Med.L.Rptr. 1616 (D. Kan. 1978); *Amato v. Fellner*, 4 Med.L.Rptr. 1552 (Wis. Cir. Ct., 1978); *Dow Jones & Co. v. Superior Court of Mass.*, 303 N.E.2d 847 (Mass.Sup.J.Ct. 1973); *Winegard v. Oxberger*, 258 N.W.2d 847 (Ia. Sup. Ct., 1977), *cert. denied*, 436 U.S. 905 (1978); *Caldero v. Tribune Pub. Co.*, 562 P.2d 791 (Id. S. Ct., 1977), *cert. denied*, 434 U.S. 930 (1977); *Sierra Life Ins. v. Magic Valley Newspapers*, 6 Med.L.Rptr. 1769 (Id. Sup. Ct., 1980); *Ammerman v. Hubbard Broadcasting, Inc.*, 572 P.2d 1258 (N.M.Ct.App., 1977), *cert. denied*, 436 U.S. 906 (1978); *Goldfeld v. Post Publishing*, 4 Med.L.Rptr. 1167 (Conn. Super. Ct., 1978); *Greenberg v. CBS, Inc.*, 419 N.Y.S.2d 988 (1979); *Mazella v. Philadelphia Newspapers*, 479 F.Supp. 523 (E.D. N.Y. 1979); *Mize v. McGraw-Hill*, 5 Med.L.Rptr. 1156, adhered to on rehearing, 5 Med.L.Rptr. 2614 (S.D.Tex., 1979); *Bilney v. Evening Star*, 5 Med.L.Rptr. 1931 (Md.Ct.App., 1979); *Downing v. Monitor Publishing Co.*, 415 A.2d 683 (N.H. Sup. Ct., 1980); *Rancho La Costa v. Penthouse*, 6 Med.L.Rptr. 1249 (Cal Super. Ct., 1980); *In re Dack*, 5 Med.L.Rptr. 1886 (N.Y. Sup. Ct., 1979).

The instant interlocutory appeal presents the court with a clear record wherein the only issue on this appeal is whether the California shield law or Federal constitutional provision prohibits the disclosure of confidential sources that was ordered here. The state law question will be considered in the next section.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING PROPER APPLICATION OF STATE LAW CREATING A PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL NEWS SOURCES IN A MULTI-STATE PUBLIC FIGURE, MEDIA DEFAMATION ACTION WHERE DIVERSITY JURISDICTION IS INVOKED.

According to Dean Prosser "choice of law in defamation cases is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959, 971 (1953). A question presented by this appeal is whether a diversity action filed by a Virginia plaintiff against two California defendants in the United States District Court in Texas is governed by California law. If so, petitioners contend that the California constitutional provision (previously codified in the California Evidence Code) prohibits the lower courts' forced disclosure of the confidential news sources.

The court below refused to decide which state law applied. Its refusal was based upon the erroneous assumption that the California shield law did not create a privilege. This construction of California law was based upon an assembly committee report which was inserted in the West Edition of the California Evidence Code. The court below construed this as legislative history of the statute. It most emphatically was not. Under California law it is clear that a committee report is separate and distinct from the legislative history. *See* 58 Cal. Jur. 3d Statutes Section 161 at 562 (1980); *Smith v. Rhea,* 72 Cal. App. 3d 361, 140 Cal. Rptr. 116, (Cal. App. — 4th Dist., 1977). Under California law, comments in a committee report pertaining to existing legislation are entitled to little weight in ascertaining the

intent behind such legislation. 58 Cal. Jur. 3d supra at 563; *Leffel v. Municipal Court of Fresno County*, 54 Cal. App. 3d 569, 126 Cal. Rptr. 773 (Cal. App. — 5th Dist., 1976). The California provision shielding reporters from forced disclosure of confidential sources has been in existence since 1935. In *Rosato v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (Cal. App. — 5th Dist., 1975) *cert. denied*, 427 U.S. 912 (1976) the court held:

> "There is no available legislative history (on Section 1070 of the Evidence Code which is now contained in the California Constitution) to show what the Legislature's purpose was in enacting the shield law in California, nor is there any explicit statement from that body on how broad it intended the privilege to be, so we must look to other aids. The first shield law was enacted by an amendment, in 1935, to former Code of Civil Procedure section 1881, a statute which listed certain privileges against giving testimony, after an introductory policy declaration stating that "There are particular relations in which it is the policy of the law to encourage confidence." The coverage of the section has been enlarged by several amendments since then. When the laws of evidence were codified in 1965, the newspersons' shield law became Evidence Code section 1070. The California Law Revision Commission which was responsible for the initial drafting of the Evidence Code, noted that "Despite the absence of reliable evidence in the form of legislative history or judicial interpretation, the effect of the statutory privilege in California appears to be a carte blanche grant of an absolute and unqualified privilege to newsmen to refuse to disclose the source of any information procured for and used in the protected news media." (6 Cal.Law. Revision Commission Reports, Recommendations and Studies, *A California Privilege Not Covered by the Uniform Rules — Newsmen's Privilege*, 481, 484 (1964). The California Law Revision Commission

> favored placing limitations on the privilege, but the Legislature rejected the proposals. "Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. [Citation]" (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249, 66 Cal.Rptr. 20, 23, 437 P.2d 508, 511). . . . Having in mind this rule as it relates to the unqualified language used in Evidence Code section 1070, together with the observations of the California Law Revision Commission, we believe the Legislature in enacting Evidence Code section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction . . . Though the burden is on the person claiming the privilege, it is not a heavy one.

124 Cal. Rptr. at 445

The Fifth Circuit disregarded this controlling authority from the highest California Appellate Court to rule on whether Section 1070 created a privilege. The *Rosato* case makes it abundantly clear that the provision of the evidence code which is now contained in the California Constitution does, in fact, confer a privilege upon newspersons. But even if the California law does not create a privilege, it expressly prohibits a trial judge from holding a journalist in contempt for refusing to reveal his source after a judicial order to do so. That is an important substantive right to which petitioners are entitled and which the Fifth Circuit refused to decide.

In a diversity case it is incumbent upon the Court to apply applicable state law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The choice of law rules of the forum state must be applied by a federal court to determine which state law applies. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941). The Courts below refused to do this.

As the Third Circuit held in *Steaks Unlimited v. Deaner, supra*, "The threshold inquiry is which state's substantive law is applicable to this diversity action." *Id.* at 269. Since the opinion in this case the Fifth Circuit has recognized that the state law question in a defamation action ought to be decided prior to reaching a constitutional issue. *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1241 (5th Cir. 1980).

In tort cases Texas follows the Restatement Second, Conflicts of Laws which calls for application of the "most significant relationship" test in determining which jurisdiction's law applies. *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. Sup. Ct. 1979). Petitioners contended in the court below that under this test and, under the facts of this case, California bears the most significant relationship to this litigation. In the alternative, petitioners prayed for a remand for the court's determination on which law should apply. *See*, Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 Hastings L.J. 1515 (1979).

Professor Rose argues that since this court's determination in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) the primary focus in a libel case is on the conduct of the defendant; that is, whether he acted with some degree of fault (negligence or "actual malice"). Thus, the most significant relation to the litigation would generally be the place of the defendant's domicile. It is that state which has decided whether to hold its publishers to a negligence or "actual malice" standard of reporting in private figure libel cases. The standard of conduct in a public figure case, as here, is constitutionally compelled. In this case, however, California has an added interest in that it has determined that members of the California press should not be required to reveal the identities of confidential news sources. In 1964 the California Law Revision Commission commented on the California Shield Law as follows:

> . . .[T]he primary purpose of the proposed rule is to protect the indentity of informants so as to maintain

> confidential sources of information considered of interest to the public. A California Privilege Not Covered by the Uniform Rules — Newsmen's Privilege, 6 Cal.Law Rev. Comm., 481, 506 (1964) quoted in Comment, Newsman's Immunity Statute, 8 San Diego L.Rev. 110, 113 (1971).

The reporter, a California resident, gave promises of confidentiality to his sources based upon an assumption that California law respected and would protect his source relationship. The Court below erroneously misinterpreted California law in this case.

The "most significant relationship" test is applied in most jurisdictions with respect to multi-state defamation actions. R. Sack, *Libel, Slander and Related Problems*, 528 (1980). A ruling of this Court as to what bearing: (1) the constitutionally compelled requirement that states not impose liability against a media defendant in a libel case without fault and; (2) the existence of a state Shield law has on the most "significant relationship test" would promote uniformity in the law and resolve a recurring problem in the law.

In addition to its failure to apply the California Shield Law the lower court did not consider petitioners' common law rights. If California or Texas law applies, a common law right against compelled disclosure of the source exists:

Section 22.2 of the California Civil Code indicates that:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

In libel cases in England during pretrial discovery where fair comment has been pleaded, a publisher such as Transamerican

or Parkhurst enjoys a privilege against divulging its confidential sources. This privilege dates back to the nineteenth century case of *Hennessy v. Wright, (No. 2)*, 24 Q.B.D. 445n (C.A.) (1888). The most complete treatment of this issue may be found in *Plymouth Mutual Cooperative and Industrial Society v. Trader's Publishing Association*, 1 K.B. 403 (C.A.) (1906). *See also*, Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L.Rev. 1111,1115-21 (1960). The English common law is not inconsistent with the law of the State of California. English common law would be applied in Texas although not in Virginia. *See, Marks v. Morris*, 4 HEN. & M. (14 Va.) 463 (1809).

Finally, the lower court did not consider, if Texas law applies, whether a privilege exists under Article 1 Section 8 of the Texas Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

CHARLES L. BABCOCK
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
4300 First National Bank Bldg.
Dallas, Texas 75202
214/655-2911
Counsel of Record for Petitioners

Charles L. Babcock

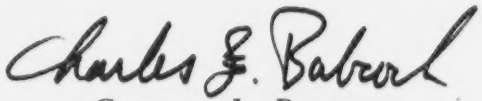
CHARLES L. BABCOCK

Of Counsel
James M. Schendle
Counsel for Petitioners

Date: January 20, 1981

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition for writ of certiorari have been sent by certified mail first class postage prepaid on the 20th day of January, 1981 to Mr. Otto Mullinax, counsel of record for respondent located at 8204 Elmbrook Drive, Suite 200, Dallas, Texas 75247; and to Gardere & Wynne (formerly Wynne, Jaffe & Tinsley) counsel of record for Transamerican Press of Texas, Inc. located at 1500 Diamond Shamrock Tower, Dallas, Texas 75201 c/o Joe Harrison.



CHARLES L. BABCOCK

Charles L. Babcock

APPENDIX I

Murray W. (Dusty) MILLER,
Plaintiff-Appellee,

v.

TRANSAMERICAN PRESS, INC.,
Transamerican Press of Texas, Inc.
and
Mike Parkhurst, *Defendants-Appellants.*

No. 78-1206.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

July 15, 1980.

Appeal from the United States District Court for the Northern District of Texas.

Before COLEMAN, Chief Judge, FRANK M. JOHNSON, Jr. and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

In this 28 U.S.C. §1292(b) interlocutory appeal, we decided whether the plaintiff in a libel suit can compel discovery of the identity of a confidential source of the journalist defendants. We conclude that he can.

Murray W. (Dusty) Miller, Secretary-Treasurer of the International Brotherhood of Teamsters, sued Transamerican Press and Mike Parkhurst for libel. Transamerican Press, a California corporation, published *Overdrive*, a magazine which

had national distribution to truckers.[1] Parkhurst, a California citizen, was editor and publisher. For convenience, we refer to both defendants as Transamerican. Miller is a Virginia domiciliary who works in Washington, D.C.[2]

In its June, 1972, issue, *Overdrive* published a nine page article entitled "Central States Pension Fund — How Your Sweat Finances Crooks' Cadillacs." One passage in the article alleged that Miller swindled the pension fund out of $1.6 million through a fraudulent loan:

> The money doesn't all go to the employer segment of trucking. Take Murray (Dusty) Miller, 4th Vice-President of the International and Director of the Southern Conference. Dusty was a trustee of the Fund from its formation in 1955 until 1968. Before he left, Dusty borrowed $1.6 million in 1965 from the Fund to buy Trinity Sand & Gravel in Dallas. Almost immediately, the Fund foreclosed on the company without a single penny having been paid on the loan. Almost as instantly, a new corporation was formed which borrowed another $1.4 million from the Fund. This corporation — Metropolitan Sand & Gravel — was set up by St. Louis attorney Morris Shenker, and his ownership in it is 45%. Shenker is probably right behind Dorfman when it comes to having influence over the Fund. Shenker, though, specializes in dealing with the Mafia, a subject to be covered thoroughly

---

[1] Transamerican Press has filed for bankruptcy and *Overdrive* is no longer published.

[2] We proceed on this assumption for purposes of this opinion only. At oral argument, Miller's counsel said that although Miller is formally a Virginia domiciliary and formally has his principal place of business in Washington, D.C., in reality he lives and conducts most of his business in Texas. Transamerican's counsel disputed this, contending that there was nothing in the record to show it. We express no opinion on this dispute, which the trial court may have to resolve at a later stage of this case.

> in our next article. The 2,800 acres of land now controlled by Shenker, it appears, now is valued at $300 million, thanks to a federal decision to build a multi-billion dollar barge channel through it from Dallas-Fort Worth to the Gulf of Mexico. This good fortune doesn't seem to have affected the company's payments to the Fund: $1.1 million loan (This does not include the $1.6 million. That is gone. Just ask Dusty.)

Miller had been a trustee of the Central States Pension Fund from 1955 to 1968. He was Fourth Vice President of the International and Director of the Southern Conference from 1957 to 1972, and held that office at the time of publication. At the time of publication, he lived and worked full time in Texas. When he filed this suit he was a Virginia domiciliary.

Discovery began, and Miller learned from Parkhurst and James Drinkhall, the author of the article, that the source of the passage was a confidential informant. Miller filed three motions to compel disclosure of the identity of the informant. Each was denied by the district court, which found that Miller had not exhausted alternative means of proving that Transamerican was reckless.

Miller submitted an affidavit swearing that the charges were false. Transamerican claimed that Morris Shenker, a trustee of the pension fund and an ultimate purchaser of Trinity's land, would be in a position to say whether Miller had pocketed any of the $1.6 million in loans to Trinity. Miller then submitted written interrogatories to Shenker, who answered that, to his knowledge, Miller had never borrowed any money from the Central States Pension Fund.

On April 22, 1975, after an *in camera* examination, the district judge ordered the defendants to produce summaries of non-privileged parts of the file used in preparation of the article. The order provided that the summaries were for the use of Miller's counsel only, and were strictly for use in the litigation. In addition to the summaries, some non-privileged documents were released to Miller's counsel.

On April 21, 1977, Miller moved for the fourth time for disclosure of the identity of the informant. In his memorandum and order of October 17, 1977, the district judge ordered disclosure, concluding that the informant's identity went to the heart of the matter. At the request of Transamerican, the judge certified the order for an interlocutory appeal under 28 U.S.C. §1292(b).

I. Is Miller a public figure?

[1-4] The district court assumed that Miller was a public figure in its order of July 25, 1974. However, in its order of October 17, 1977, it clearly stated that it had as yet made no ruling on this issue. In a defamation case, the question of public figure status is pervasive, and it should be answered as soon as possible. In some cases it may not be possible to resolve the issue until trial, but this is not such a case. Miller, a high-ranking official of a union of tremendous importance to our economy, as relates to his official duties is a public figure. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Because Miller is a public figure he must prove Transamerican acted with malice when it published the article. As we noted in our recent decision of *Long v. Arcell,* 618 F.2d 1145, 1147 (5th Cir. 1980), involving public figure plaintiffs:

> In order for the plaintiffs to recover damages, therefore, they were required to prove by clear and convincing

evidence that the defendants acted with actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967). A publisher acts with actual malice when he prints a story with knowledge that it is false or with reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789, 806 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968).

II. Which state's law governs?

Transamerican argues that the law of California, the state where the editorial work was done and the home state of Transamerican and Parkhurst, governs the existence of a reporter's privilege.

[5] Under Fed.R.Evid. 501, the availability of a privilege in a diversity case is governed by the law of the forum state. The question of which law Texas, the forum state, would apply is difficult. *See* Reese and Leiwant, *Testimonial Privileges and Conflict of Laws*, 86 Law and Contemp. Problems 85 (1977); Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 Minn.L.Rev. 461 (1977).

We do not have to resolve this issue since all jurisdictions whose law might be applicable follow the same rule. Texas has no reporter's privilege statute, and the Texas Supreme Court has not considered the issue. Two decisions have limited a reporter's privilege of non-disclosure of confidential sources to what is required by the First Amendment. *Dallas Oil & Gas v. Mouer*, 533 S.W.2d 70 (Tex.Civ.App. Dallas, 1976); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D.Tex. 1969). Virginia has

no reporter's privilege statute, and the Virginia Supreme Court has tailored the privilege to the limits protected by the First Amendment. *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1976), *cert. denied*, 419 U.S. 966, 95 S.Ct. 229, 42 L.Ed.2d 182. The Court of Appeals for the D.C. Circuit has done the same in the District of Columbia. *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), *appeal dismissed*, 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661. That leaves California.

At first glance, California Evidence Code §1070(a) (1979 Supp.) arguably bars disclosure of the informant's identity.[3] A parsing of the language and a review of the legislative history, however, compel a different interpretation.[4] The California legislature did not create a reporter's privilege broader than the First Amendment. It only prohibited the use of contempt citations against newsmen refusing to disclose their sources.

---

[3] §1070. Newsmen's refusal to disclose news source

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

[4] The California Assembly Committee on the Judiciary noted:

. . . It should be noted that Section 1070, like the existing law, provides an immunity from being adjudged in contempt; *it does not create a privilege*. Thus, the section will not prevent the use of other sanctions for refusal of a newsman to make discovery when he is a party to a civil proceeding. (Emphasis added.)

Assembly Committee on Judiciary, *Comment on Cal.Evid.Code & 1070, reprinted at* Cal.Evid.Code §1070 (West, 1968).

[6] Thus each jurisdiction with an interest in having its law applied limits the reporter's privilege to the protections afforded by the First Amendment.

III. Do the defendants have a First Amendment privilege against disclosure?

[7,8] This case is controlled by *Butts, supra; Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); and *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). We hold that a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield. As the Supreme Court observed in *Herbert v. Lando*: "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." (99 S.Ct. at 1648).

Four other circuits have considered this issue. *Carey v. Hume, supra; Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973); *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910,79 S.Ct. 237, 3 L.Ed.2d 231. *See also Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (tort case; conspiracy to violate constitutional rights). However, we are the first to consider it since *Herbert v. Lando*.

Butts held that a public figure could recover for defamation only if the defendant acted recklessly or with knowing falsehood. *Branzburg* held that in grand jury proceedings, reporters must disclose the names of confidential informants except where the grand jury power was abused. *Herbert* held that the press had no First Amendment privilege against discovery of mental processes where the discovery was for the purpose of determining whether malice existed.

The policies supporting a First Amendment privilege would appear to be stronger here, where a defamation plaintiff seeks to compel disclosure of the name of a confidential informant, than they were in either *Branzburg* or *Herbert*. In *Herbert*, the Supreme Court reasoned that requiring disclosure of journalists' thought processes would have no chilling effect on the editorial process; the only effect would be to deter recklessness. However, forced disclosure of journalists' sources might deter informants from giving their stories to newsmen, except anonymously. This might cause the press to face the unwelcome alternatives of not publishing because of the inherent unreliability of anonymous tips, or publishing anonymous tips and becoming vulnerable to charges of recklessness.

Similarly, there is a more apparent interest in protecting the confidentiality of journalists' sources in libel cases than in grand jury proceedings. In *Branzburg*, the prosecutor had an interest in keeping the informant's identity secret in order to protect him from reprisal. The government and the press had a similar purpose, both were ferreting out wrongdoing and seeking to correct it. In a libel case, the plaintiff and the press are on opposite sides. And a defamed plaintiff might relish an opportunity to retaliate against the informant.

Butts tells us that there is a First Amendment policy of free investigation of public figures because their activities are matters of public concern. 388 U.S. 130, 164, 87 S.Ct. 1975, 1996 (Warren, C.J., concurring); *cf.* Hill, *Defamation and Privacy Under the First Amendment*, 76 Col.L.Rev. 1205, 1214-19. The First Amendment interest in granting a privilege is particularly strong when the article concerns a public figure.

A final First Amendment consideration, in a case involving a public figure, is that it will often be possible to establish malice or lack of malice without disclosure of the identity of the informant. A plaintiff may be able to find other evidence of malice, or a defendant may be able to come forward with sufficient evidence

of prudence in printing which would carry the burden in support of a motion for summary judgment.

The other circuits have followed a three part test first outlined in *Garland:* (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?

In the case before us the information is relevant. The district court found that the alternative means had been exhausted, and this finding is not clearly erroneous. Fed.R.Civ.P. 52. That leaves the third prong, compelling interest.

In *Cervantes,* the Eighth Circuit found no compelling interest when the mayor of St. Louis complained of four paragraphs in an 87 paragraph story. There was ample evidence showing that a thorough investigation preceded publication.[5] The court said:

> [I]f, in the course of pretrial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure . . . become more compelling. Similarly, where pretrial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion . . .

464 F.2d at 994.

---

[5] The mayor complained that he had been defamed in an article entitled "The Mayor, The Mob and The Lawyer." The lawyer was Morris Shenker.

In *Carey*, the D.C. Circuit found a compelling interest in disclosure. The record did not disclose a thorough investigative effort by the defendant. The plaintiff, a high official of the United Mine Workers, was accused of thwarting a government investigation by removing boxes of incriminating documents from his office at night over an indefinite period of weeks. The only evidence within the plaintiff's control that could disprove the story was his own testimony. Since the story was based solely on information from a confidential informant, the only way to determine recklessness was to examine the reliability of the informant.

Garland was similar to *Carey*. Judy Garland claimed she was defamed in a newspaper article that quoted an unnamed CBS executive. She sued CBS and deposed the two executives who supposedly had made the defamatory statement. Both denied having made it. Garland subpoenaed the reporter to determine the source of her information. The reporter's claim of privilege was overriden. The information was obviously relevant and there was no other proof reasonably available to Miss Garland.

Miller's case is more akin to *Garland* and *Carey* than it is to *Cervantes*. Unlike the mayor in *Cervantes*, Miller challenges every statement that refers to him and that could be interpreted as defamatory. Like the defendants in *Carey* and *Garland*, Transamerican's only source for the allegedly libelous comments is the informant. The only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.

[9] We affirm the district court's order compelling disclosure of the informant's identity. On remand, the district court should protect the informant by restricting the information about the informant's identity to counsel and requiring that it be used

strictly for the litigation. The district judge observed in his April 22, 1975 order that the material in the back-up file tended to undercut a showing of recklessness. After disclosure, further summary proceedings may be appropriate.

The decision of the district court is AFFIRMED and the matter is returned to the district court.

Murray W. (Dusty) MILLER,
Plaintiff-Appellee,

v.

TRANSAMERICAN PRESS, INC.,
Transamerican Press of Texas, Inc.
and
Mike Parkhurst, *Defendants-Appellants.*

No. 78-1206.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

October 23, 1980.

Appeal from the United States District Court for the Northern District of Texas; Eldon B. Mahon, Judge.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion July 15, 1980, 5 Cir., 1980, 621 F.2d 721)

Before COLEMAN, Chief Judge, and FRANK M. JOHNSON, Jr. and POLITZ, Circuit Judges.

PER CURIAM:

Having considered the application for rehearing with suggestion for rehearing en banc filed by the appellants, IT IS ORDERED that the opinion of this court be supplemented by

adding the following paragraph to 621 F.2d 721 immediately before the paragraph enumerated as syllabus number 9:

> We do not mean to intimate that a plaintiff will be entitled to know the identity of the informant merely by pleading that he was injured by an untrue statement. Before receipt of such information the plaintiff must show: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case. From our review of the record, we are satisfied that all of these requirements have been met.

The application for rehearing filed by the appellants is in all other respects DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc filed by appellants is also DENIED.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MURRAY W. (DUSTY) MILLER	)	
vs.	)	CIVIL ACTION
TRANSAMERICAN PRESS, INC.,	)	NO. CA 3-6695-E
TRANSAMERICAN PRESS OF TEXAS, INC., and MIKE PARKHURST	)	

MEMORANDUM AND ORDER

There is now before the Court Plaintiff's Fourth Motion to Force Discovery of Confidential Sources. Having considered the motion, briefs, affidavits and oral arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

This is a suit involving an article by the Defendants in the magazine *Overdrive* which allegedly libeled the Plaintiff, a former trustee of a Teamsters Union trust fund. The article alleged that an informed source told them that the Plaintiff had illegally borrowed $1.6 million from the trust fund. This case was originally filed 17 January 1973 and Plaintiff says that he has done all the discovery he can without knowing Defendant's source or sources for the article. Defendant disputes this, however, and argues that there are a number of potentially

knowledgeable people who have yet to be deposed. They also suggest that the Teamster fund's files might be obtained from the Justice Department or the Internal Revenue through a Freedom of Information Act request. Up to now the Court has carried along Plaintiff's request for the confidential source or sources in the hope that Plaintiff might be able to establish his case without the necessity for a disclosure. The Court is now of the opinion that this is not possible.

CONCLUSIONS OF LAW

Because of some confusion that arose during the hearing on the Motion to Compel, the Court wants to make clear that it has as yet made no ruling as to whether the Plaintiff is a public figure. The Court is of the opinion, however, that such a determination is not necessary prior to compelling disclosure of Defendant's source(s).

If in fact Plaintiff is a public figure, to win the libel suit he must show that Defendant libeled him with actual malice, i.e.. with knowledge that the allegation was false or with reckless disregard of whether it was false or not. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *New York Times v. Sullivan,* 376 U.S. 254 (1964). This Court is of the opinion that the identity of the source goes to the heart of Plaintiff's libel action. *Garland v. Torre,* 259 F.2d 545 (2nd Cir. 1958); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974). In this case as in the *Carey* case, malice might be shown "by proof that [Defendant] in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless." *Carey,* at 637.

If, on the other hand, Mr. Miller is determined not to be a public figure, his burden is to show that Defendant knew or should have known that the defamatory statement was false.

Foster v. Laredo Newspaper, Inc., 541 S.W.2d 809 (Tex. 1976); *Houston Belt & Terminal Ry Co. v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. — Houston [1st Dist.] 1976. writ ref'd n.r.e.). To meet this burden Plaintiff might show that Defendant's source had no connection with the Teamster trust fund or that for some other reason was not reliable. The identity of the informant would still go to the heart of the libel action. *Carey v. Hume, supra.*

In its order of 26 July 1974, the Court stated that it would not hesitate to compel discovery of Defendant's confidential sources when it appeared that the issue went to the heart of Plaintiff's case. The Court is now of the opinion that such is the case.

It is therefore ORDERED that Plaintiff's Fourth Motion to Force Discovery of Confidential Sources be and hereby is granted.

Signed this 17th day of October, 1977.

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

No. 80-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSAMERICAN PRESS, INC., and MIKE PARKHURST,
Petitioners,

v.

MURRAY W. (DUSTY) MILLER,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

OTTO B. MULLINAX
MULLINAX, WELLS, BAAB,
& CLOUTMAN, P.C.
8204 Elmbrook, Suite 200
Dallas, Texas 75247
(214) 630-3672
Attorneys for Respondent

Of Counsel:
MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
8204 Elmbrook, Suite 200
Dallas, Texas 75247
(214) 630-3672

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Respondent would state the issues as follows:

1. Whether the trial court properly balanced the rights of respondents to a fair trial with the petitioners rights under the First Amendment in compelling the disclosure of confidential informants.

2. Whether the issue of California or other shield laws, if any, is ripe for decision.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	6

TABLE OF AUTHORITIES

American Construction Co. v. Jacksonville T & K.R. Co., 148 U.S. 372, 384, 13 S.Ct. 758 (1893)	6

Statutes

28 U.S.C. §1292(b)	2,5

Other Authorities

Supreme Court Practice, by Stern & Gressman, 5 Ed., §4.19 p. 300ff	6

PREVIOUS PAGE WAS BLANK

No. 80-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSAMERICAN PRESS, INC., and MIKE PARKHURST,
Petitioners,

v.

MURRAY W. (DUSTY) MILLER,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported in 621 F(2) 721, and the opinion denying rehearing in 628 F (2) 932. The opinion of the district court is properly set out in appendix II of Petitioners' Application.

JURISDICTION

Properly stated by Petitioners, if their Application was on file on or before January 21, 1981.

STATUTE INVOLVED

28 U.S.C. §1291 (b). When a District Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district court or the Court of Appeals or a judge thereof shall so order.

STATEMENT OF THE CASE

I. Nature of the Case

Respondent, M.W. Miller, a long time resident of Dallas, Texas and a temporary resident of Virginia when suit was filed, brought this action in Texas against Petitioners residents of California, and Transamerica Press of Texas, Inc., a Texas corporation for damages for libel. After numerous discovery efforts, it became apparent that alleged confidential informants of petitioner were the sole source of evidence bearing upon the defamatory printing. After denying three motions to discover the identity of the informant, and forcing additional discovery, the trial court granted the fourth motion. Then the trial court granted an interlocutory appeal from that order and the Fifth Circuit accepted such appeal under 28 U.S.C. §1292(b). The Fifth Circuit affirmed the order for discovery. Mandate is back in the trial court.

II. The Pertinent Facts

It early became apparent that Drinkhall, an officer and reporter of Transamerica Press who wrote the libelous statement of respondent, obtained the information upon which he relied from an alleged confidential source. Petitioners' attorney, by letter response to Respondent's attorney's (see TR p. 157/165)

question: "Are there alternative avenues whereby he [plaintiff] can ascertain the same information for which we [defendants] are asserting a privilege?" Answered: "There are none of which we are aware as of this time".

Petitioners, in answer to the second set of interrogatories propounded to them by Respondent (see TR p. 114/125) to question 2: "Please given the name and addresses of all witnesses on whom you expect to rely and to introduce their testimony at trial to prove the statement: 'Before he left, Dusty borrowed 1.6 million in 1956 from the fund to buy Trinity Sand and Gravel in Dallas.' " Answered: "As far as Defendants are aware, only confidential informants would testify as to the truth of said statement and these confidential informants will not be produced at trial." The Trial and Appeals Courts have now ordered the discovery of the confidential informants.

REASONS FOR DENYING THE WRIT

I. The Decision Rendered By The Fifth Circuit In This Case Is Not In Conflict With The Decision Of Another U.S. Court Of Appeals Or This Court And Is In Conformity With The Law Generally, And Balances The Rights Of Respondent To A Fair Trial With Petitioners' Rights Under The First Amendment.

The Court of Appeals pointed out that "Transamerican's only source for the alleged libelous comments is the informant. The only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that he must know the informant's identity."

Petitioners themselves set forth the history of cases from all circuits and fail to point to a single circuit in dispute with the Fifth Circuit's opinion, although some circuits would not force a plaintiff to go as far in discovery as was actually done here.

Petitioners want this Court to order a plaintiff to exhaust "(a) Justice Department files; (b) Internal Revenue Service files, and (c) interviews or depositions of various individuals" when by their own admission and the finding of the Fifth Circuit the "only source for the alleged libelous comments is the informant."

Petitioners have failed to point to a single First Amendment Interest not considered or wrongly considered in this case. Indeed, they want this court to grant them a license to print as they please and grant them immunity from libelous conduct. That flies in the face of every decision of this Court to date.

II. The Issues As To The Applicability Of The California Shield Law Or Shield Laws Of Other States, If Any, Were Not Presented To The Trial Court For Decision And Were Not Certified For Decision Under 28 U.S.C. §1292(b) Or The Order Of The Court Granting The Interlocutory Appeal, And Are Not Ripe For Decision.

The matter of the application of the so-called shield laws should await development of such issues in the trial court after motions and evidenciary hearing, and rulings by the trial court. Otherwise, Art. 28 U.S.C. §1292(b) has little meaning. If the California law should be applied by a Texas Court, the method of application and the Constitutional challenge to it can then be developed in an orderly manner. Indeed the issue may not even be reached! There may not be a confidential informant; if there is one or more they may decide to comply with the court's order; if they don't, the court may not judge them in contempt. A number of other solutions may be found. If contempt is ordered, it may violate the California Statute, or violate only an invalid or unconstitutional portion thereof.

CONCLUSION

Petitioners really seek advisory opinions on issues not yet ripe for decision and which may never be reached. No conflicts in decisions have been demonstrated, and the duty to protect confidential informants has been carefully, indeed preponderantly, balanced with respondents right to a fair trial. The petition should be denied. *American Construction Co.* v. *Jacksonville T & K.R. Co.,* 148 U.S. 372, 384, 13 S.Ct. 758(1893); *Supreme Court Practice,* by Stern & Gressman, 5 Ed. §4.19 p. 300ff.

Respectfully submitted,

OTTO B. MULLINAX
MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247
(214) 630-3672
Attorneys for Respondent

Of Counsel:
MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247
(214) 630-3672

see 80

1383